

Calliope Designs, Inc. and Sonoma County Industrial Union/S.E.I.U., Local 707. Case 20–CA–22681

May 24, 1991

DECISION AND ORDER

BY MEMBERS CRACRAFT, DEVANEY, AND OVIATT

On September 13, 1990, Administrative Law Judge Joan Wieder issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondent filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions² and to adopt the recommended Order.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

¹ The General Counsel has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

² In agreeing with the judge's dismissal of the complaint, we find it unnecessary to pass on the judge's alternative finding that the employees did not engage in protected concerted activity inside the Respondent's office.

Assuming *arguendo* that going to the office was protected concerted activity, and thus that the General Counsel made out a *prima facie* case by showing that the Respondent relied on that conduct, we agree that the Respondent successfully rebutted the *prima facie* case under *Wright Line*, 251 NLRB 1083 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). The Respondent met its burden by showing that it would have disciplined the employees in any event for their subsequent conduct, the totality of which exceeded the protections of the Act by interfering with the Respondent's investigation of Hernandez' accident and its attempt to obtain medical attention for her. In finding that the employees' conduct exceeded the protection of the Act by interfering with the Respondent's investigation and attempts to obtain aid, Member Cracraft relies only on the employees' refusal of at least three directives to return to work.

Karen V. Clopton, Esq., for the General Counsel.

Michael P. Merrill, Esq., of Santa Rosa, California, for the Respondent.

DECISION

STATEMENT OF THE CASE

JOAN WIEDER, Administrative Law Judge. This case was heard before me in Santa Rosa, California, on February 21, 1990. The charge was timely filed July 26, 1989,¹ by Sonoma County Industrial Union/S.E.I.U., Local 707 (the Union). The charge resulted in the issuance of a complaint dated July 26, 1989, as amended, alleging Calliope Designs,

Inc. (Respondent or Company), violated Section 8(a)(3) and (1) of the National Labor Relations Act, as amended, by suspending employees Javier Arreguin, Roberto Garcia, Rafael Lopez, and Sara Ochoa because these employees engaged in activities protected by Section 7 of the Act and thereby discriminated against these employees to discourage them from engaging in concerted protected activities.

Respondent, in its answer to the complaint, as amended, conceded, *inter alia*, that it meets one of the Board's jurisdictional standards,² but denies committing any unfair labor practices. Respondent claims these employees were suspended for cause, including engaging in unauthorized activity while on duty, threatening a supervisor, refusing to follow orders, and interfering with other employees in the performance of their duties. Prior to and during the hearing, General Counsel withdrew several allegations in the original complaint. Respondent, at the close of General Counsel's case, moved for dismissal of the remaining allegations averring the General Counsel had not established a *prima facie* case. I deferred ruling on the motion to dismiss for consideration in this decision. For the reasons stated, Respondent's motion is granted.

Respondent admits, and I find, the Union is, and has been at all material times, a labor organization within the meaning of Section 2(5) of the Act.

On the entire record, including my observation of the witnesses, and after careful consideration of the posttrial briefs filed by counsel for General Counsel and Respondent, I make the following

FINDINGS OF FACT

I. THE ALLEGED UNFAIR LABOR PRACTICES

A. Background

Respondent, a California corporation, produces Christmas tree ornaments for wholesale and retail sale. Respondent admits during June, Pat Bradley was general manager, Lisa Cacace was production manager, and Steve Vandervort was a supervisor in the shipping department and they were supervisors within the meaning of Section 2(11) of the Act and agents within the meaning of Section 2(13) of the Act.

The Company has about 35 employees engaged in the production of ornaments. Some of the production workers do not speak or understand English. Respondent does not have a supervisor or other management representative that is fluent in Spanish.

The Union established a collective-bargaining relationship with Respondent pursuant to a Board-conducted election in March 1988. The Union and Respondent successfully negotiated a collective-bargaining agreement. Union Representative Newman Strawbridge was on the negotiating committee along with Javier Arreguin, Rafael Lopez, Roberto Garcia, Adolfinia (Fina) Hernandez, and Sara Ochoa. There was no evidence concerning animus during these negotiations.

² Based on this admission, I find Respondent is an employer within the meaning of Sec. 2(2) of the Act, engaged in commerce within the meaning of Sec. 2(6) and (7) of the Act.

¹ All dates are in 1989 unless otherwise stated.

B. Events of June 1, 1989

The background facts are largely uncontroverted. The dispute centers around employees' actions after Adolfinia Hernandez had an accident the afternoon of June 1, 1989.

1. The meeting during 9:30 break

Routinely, during nice weather, the same group of employees take their 9:30 a.m. break in the company parking lot. Also routinely, Respondent held employee meetings every Thursday; June 1 was a Thursday. In preparation for the company employee meeting, employees, including Javier Arreguin, Rafael Lopez, Roberto Garcia, Adolfinia Hernandez, and Sara Ochoa discussed some work-related concerns they wanted to present at the meeting with management.

Adolfinia Hernandez was a principal speaker at the parking lot meeting which was attended by at least 10 employees, all union members; including all the alleged discriminatees. Usually the union members take their breaks together. Adolfinia Hernandez had recently suffered a heart attack and was taking a blood thinner which created an expectable concern of being injured. Respondent knew of her medical condition and the dangers of her bleeding while on the medication to prevent blood clots. Adolfinia Hernandez related to her coworkers during the morning break that she had recently had a series of accidents in the past 5 days at work which she felt were not "normal."³ She felt their working conditions were dangerous. Adolfinia Hernandez also told her colleagues to recall when she wished to return to work, Respondent did not want her to return to work.⁴

Also discussed was the employees' hope a translator would attend the meeting with management. At the prior Thursday employee meeting Respondent had been requested to employ an interpreter so the Spanish-speaking employees could readily communicate their concerns to management. On occasion Adolfinia Hernandez acted as translator but felt inadequate and unable to achieve clear communications between management and employees. Adolfinia Hernandez hoped a translator would attend the employee meeting so she could explain her concerns about safety to management. The services of a translator were also desired by the Spanish-speaking employees so they could understand what management was saying to them.

³One accident occurred when she was behind the swinging door to the shipping department performing assigned work with broken ornaments stored in that location and was hit by the door which was opened quickly, contrary to a sign instructing: "Careful when you open the door." She was struck on the hand which became bruised. Hernandez also complained boxes were stacked closely behind her and in the aisles she had to use while carrying boxes, and knives and blades were left at her work station. Hernandez was very nervous and concerned she would be seriously injured because of her medical condition.

⁴Rafael Lopez recalled Hernandez saying:

There was conversation among all the co-workers that they had laid off Maria Garcia and Maria Aginai [phonetic]. And I heard Fina Hernandez say that she believed that something might happen to her, that they put knives where she was working and they put boxes behind her. And she feared something might happen to her.

And since there were no witnesses, the day before these two people had been laid off, Maria Aginai and Maria Garcia, she thought that something might happen to her.

They were the only two people related to the Union that at that time were working in the back.

2. Company meeting at 9:45

This regularly scheduled meeting was attended by about 40 people including most of Respondent's managers. Patti Bradley inquired if any employees had a problem, that they should discuss their problems. Since there was no interpreter, Adolfinia Hernandez and Lupe Ferias acted as interpreters⁵ and Adolfinia Hernandez said:

"Patti," I said, "Since last week, in the meeting, we asked you for interpreter. And you promised to have it this time. So I really—the peoples, the workers, and I, we really want it interpreted today. Because there's some very important things that we have to talk about."

Patti Bradley replied Respondent could not have an interpreter that day but may have an interpreter at the meeting next week. Adolfinia Hernandez then stated:

[In English] I said, "Patti, like I said, this is a very important meeting. These things that happen, then, it's very important the office know about it because I ask, I have orders for Steve—Steve say that anything wrong in the back room, there's no way that I can go in the office and explain it. Because we have to go only to Steve and it's—this is a very important thing that I have to say."

And then she say, "Well, I'm sorry. Maybe we have to wait for the next meeting."

And I still insist her that we need an interpreter. And even I said, "Patti, if we have to pay the interpreter, we pay half and then the—you—the company can pay half. And if they no have the interpreter right now, we've not been no good for have the meeting today." And that's all.

I only told that to Patti. I also said it in English, "Patti, the workers have a very important things, too, other than me, that we have to tell the company. Can I bring—can we bring somebody for interpreting in this meeting, because we want to have it today."

And she said, "No." They have to have an interpreter what—she mentioned something like a license for interpreter. And I said, "Well, we have to wait, I guess." That's all we talking about in the meeting.

3. The accident

According to Adolfinia Hernandez, shortly after lunch, as she was working in the storeroom, she needed an ornament located high on a shelf and asked the storeroom supervisor, Steve Vandervort, for assistance. Steve Vandervort climbed a ladder and Adolfinia Hernandez stood next to the ladder so he could hand her the box. There were three boxes stacked on each other on the shelf. Instead of handing her the top box and then the middle one, Steve Vandervort pulled out the top two at one time. Adolfinia Hernandez told him it was dangerous and he replied "That's okay" and continued pulling out the top two boxes. He could not handle the weight and the top box fell hitting the left side of Adolfinia Hernandez's

⁵Sara Ochoa indicated the employees did not trust Lupe Ferias as a translator for she "is on the side of the company" and they wanted a neutral interpreter.

head, knocking her to the floor and causing her left shoulder to hit an iron railing.

Steve Vandervort climbed down the ladder and apologized to Adolfinia Hernandez. She replied:

Yes, you know that's what happen, because I told you be careful, that was dangerous. And you go ahead and do it anyway. You don't care what it's doing. You do it on purpose.

Steve Vandervort denied he meant to cause an accident and then lifted her up repeatedly saying he did not mean to do it, it was an accident. Steve Vandervort then accompanied Adolfinia Hernandez to the office of Lisa Cacace, passing through the production area. Adolfinia Hernandez was distraught and many of her coworkers followed her to the office. Respondent claims it was the actions of the alleged discriminatees while Adolfinia Hernandez was in the office that led to their suspensions.

When she was in the office, Adolfinia Hernandez remained very upset. Lisa Cacace attempted to ascertain what occurred:

And the more the people in the room got louder, the more hysterical she got. And I was worrying about her. She was—she looked really shaken up. And I knew she had a heart problem. And I was really afraid that something was going to happen.

And so, Fina started talking to me about Steve and Steve was still sitting there, but she was talking about him like, "He knows if I bleed that I'll die," and that, "He keeps trying to hurt me," and that, "This is the third time I've been hurt back in shipping."

And then she started to tell me about—the boxes were placed in front of her way on purpose in the shipping area and she almost tripped and hurt herself then. And that people had hit her with the door. And that the chair was put in her way on purpose. And I kept just saying, "Please, calm down. Don't worry about it now. We'll take care of that later. Just calm down for now. Patti will be right back."

Between 8 and 12 employees congregated in and/or around Lisa Cacace's small office. I reach this conclusion based on the credited evidence, including the testimony of Lolita Peter, a former employee who did not have any role in the incident and was a disinterested witness. She testified in a straightforward and convincing manner.

a. Sara Ochoa

Sara Ochoa has worked for Respondent since August 28, 1978, as an ornament maker. She was suspended effective June 5, 1989. The personnel change report stating the reason for the suspension as follows:

This suspension is in regards to the following infractions of Calliope's company's policies. . . . Infraction of Employee Conduct #5, #14 and #16.

Employee Conduct rules 5, 14 and 16 provide:

5. Engaging in unauthorized activities while on duty, such as horse play, any unsafe activity, gambling,

sleeping, using company materials and equipment to make ornaments or boxes for personal use.

14. Failure to complete work as assigned by supervisory [sic], refusal to follow orders, or failure to meet standard of quality.

16. Interference with other employees in the performance of their duties.

Ochoa was on the union negotiating committee, participated in the strike against the Company, and assisted coworkers with the knowledge and consent of the Union. After lunch on June 1, Ochoa saw Adolfinia Hernandez crying and being escorted by Steve Vandervort who was holding her hand.

And I got up and I asked, "What happened to you, Fina?"

And she said, "He dropped a 40-pound box on my head."

And I said to her, "That's what they wanted. They wanted to do you in."

Q. Do you recall exactly what you said when—when you saw Fina come in?

A. I was surprised. I got up and I said . . . "You jerks, that's what they wanted to do, do you in. That's why they fired Maria Garcia, Maria Savala, so that you wouldn't have any witnesses."

None of Respondent's supervisors understood these comments.

Sara Ochoa admitted telling the other workers: "To get up and to let us go see what had happened with Fina. But when I told them, when I turned around and told them that, they had already gotten up." She also admitted telling them to stop working. Ochoa followed Steve Vandervort and Adolfinia Hernandez to the office of Lisa Cacace. Other employees also left their work stations to follow Adolfinia Hernandez to the office and Sara Ochoa, Roberto Garcia, Rafael Lopez, and Javier Arreguin went into the office in addition to Adolfinia Hernandez and Steve Vandervort. Other employees left their work stations and gathered outside the office. Adolfinia Hernandez and Steve Vandervort were giving their respective versions of the incident to Lisa Cacace. Lee Farrell then entered the office and asked for a recitation of the accident. A minute or two after the employees arrived at the office, Lisa Cacace said: "This is not your problem. This is a problem between Fina and Steve. And you go to work." Sara Ochoa did not obey this directive but replied, in Spanish, "Fina's not well and we can't concentrate on work," and Fina told Lisa what Sara Ochoa had said.

After some more comments, Lisa Cacace left her office to get Patti Bradley. According to Sara Ochoa, Lisa Cacace made only one request for the employees to return to work. Lisa Cacace also asked all the employees gathered in and around her office that she did not want them trying to intimidate Steve Vandervort. When Patti Bradley arrived she also asked the employees to return to work. According to Sara Ochoa, Patti Bradley asked the employees only once to return to work, and the employees did immediately respond to her directive by returning to work.

According to Lisa Cacace, when the employees arrived at her office, crowding in and around a small area, Roberto Garcia was saying:

that it wasn't an accident and that he had tried to kill Fina, that Steve had tried to kill Fina. And I looked up at Roberto and I said, "Roberto, are you accusing Steve of trying to murder Fina?" And he said, "Yes. If Fina says that he tried to kill her, he tried to kill her."

And I looked back and Sara nodded—and Rafael—were nodding in agreement. And, at that point, there was a lot of conversation. There was a lot of movement within the room.

These employees were speaking very loudly in Spanish and they appeared very upset. Lisa Cacace kept warning everyone to be quiet for they were making Adolfinia Hernandez more upset, she "got hysterical and continually cried." According to Lisa Cacace:

And, at this point, I realized I needed to break the group up. And the best thing to do would be to get her alone or calmed down, at least. And I asked everybody to please leave the office, that it was time to go back to work and that we would take care of this situation, but, "you had to leave—give me some room. Give me some time alone with Fina to calm her down then I could find out what happened, find out if she was okay."

Steve asked, at this same point, he was saying, "Can we have some privacy so we can get to what actually happened." And let's, you know, get on with it instead of just feeding into her hysteria.

The employees did not return to work and Adolfinia Hernandez said: "No. Please don't leave me alone. I don't want to be alone. These people are here for me and they're on my side and I don't want to be left alone." Lisa Cacace then offered to let one of Adolfinia Hernandez' coworkers stay with her. Adolfinia Hernandez kind of pointed to Roberto Garcia but no one left the office so Lisa Cacace said: "Please. Would you guys just leave. Go back to work. We'll take care of this situation." Again, no one left the office.

Adolfinia Hernandez admitted hearing Lisa Cacace twice direct the employees to return to work and Adolfinia Hernandez interpreted her directions, and then Patti Bradley came and again instructed the employees to return to work.⁶ Although Adolfinia Hernandez claimed the employees at that time returned to work, I find, based on the credited testimony of Patti Bradley and Lisa Cacace that they did not obey these directives.⁷ Further, based on my observation of the alleged

discriminatees, I find they understood the repeated directives to return to work; they all had sufficient understanding of English to understand these directives, as they indicated in their testimony.

Lisa Cacace then tried to ascertain what happened and as Adolfinia Hernandez repeatedly claimed Steve Vandervort tried to kill her, the crowd in and around the office became more upset and vocal. After some comments, which Lisa Cacace felt were threats, as discussed below, Patti Bradley arrived, pushing her way through the crowd. Patti Bradley directed Adolfinia Hernandez and Steve Vandervort to stop arguing and asked Adolfinia Hernandez if she would like to go to a hospital; she said yes. Patti Bradley then said:

"You guys, stop arguing. Everybody go back to work. Let me get some room in here. Let me try to get to Fina and try to calm her down. She needs room to breath. Go back to work." And nobody moved again.

Patti Bradley left the office to get Adolfinia Hernandez' insurance file and when she returned, Javier Arreguin, Rafael Lopez, Roberto Garcia, and Sara Ochoa were still in Lisa Cacace's office. Patti Bradley described Sara Ochoa's activities as follows:

And Sara Ochoa was also throwing her hands up and down, but she was speaking in Spanish, so I don't know what she was saying, and—but she was very loud and—you know—with her arms—you know—flying here and there.

And then they would communicate excitedly—you know—loudly, to each other at certain points, and then—then in English, they'd make those accusations.

It was determined Rafael Lopez would go with Adolfinia Hernandez, and only after they were helping Adolfinia Hernandez to the car did the crowd start to disburse a bit, so Lisa Cacace again told them they could go back to work. According to Patti Bradley's testimony, after her second directive to disperse and return to work, all the employees but Javier Arreguin, Sara Ochoa, Rafael Lopez, and Roberto Garcia had left the office area. I credit Patti Bradley's testimony based on her open and honest demeanor. She readily recalled the events and her testimony was inherently consistent. In contrast, Sara Ochoa did not appear candid and did not readily admit to conduct other employees attributed to her on June 1.

Based on their direct and open demeanor, I credit the testimony of Lisa Cacace and Patti Bradley they directed the employees, including Sara Ochoa, to return to work, and Sara Ochoa, by her own admission refused to follow their directives. I also find Ochoa was not authorized to be at Lisa Cacace's office and her presence interfered with Respondent's investigation of the accident and obtaining medical treatment for Hernandez.

was she claimed Lisa Cacace asked the employees to return to work only once but her testimony, when she was giving a narrative of what occurred, clearly indicated Lisa Cacace asked the employees to return to work at least twice. Accordingly, I credit Adolfinia Hernandez' testimony only when it is contrary to the interests of her coworkers.

⁶ Adolfinia Hernandez testified:

A. Yes. I heard another conversation where Lisa told them to go to work. And Sara answered—in Spanish, Sara explained to me so that I would say it to her in English, please.

[In English] I tell Lisa, "Lisa, Sara said that she can't concentrate on work because whatever happened to me, she want to know first what happened—what's going to happen with myself."

Q. And what was Lisa's response?

A. She again said to go back to work. And then I repeated that to Sara.

Q. And did Sara go back to work?

A. At that time, Patti was coming back and they again were told to go back to work. And they returned.

And then Patti said it was a volunteer who wanted to accompany her to the hospital, because I didn't want to go just with them. And Rafael answered that he would go.

⁷ I conclude that Adolfinia Hernandez was not credible at times; her demeanor indicated she was trying to protect her colleagues when asked questions she perceived could do them harm. One example of her lack of candor

b. *Javier Arreguin*

Javier Arreguin is still employed by Respondent as an ornament maker. He has been active in the Union; he was a member of the negotiating committee and participated in picketing during the strike. He was suspended from June 5 through July 3, 1989, because of his “indecent” conduct on June 1. The Employee Conduct rule violations cited in his personnel change report are numbers 5, 9, 14, and 16. Rules 5, 14, and 16 are quoted above. Rule 9 provides:

Indecent conduct such as threatening, coercing, or use of abusive/offensive language toward fellow employees, supervisors or customers, on company property or while on duty. Overly loud talking or yelling is prohibited in the factory. Radios must be used with earphones only.

Javier Arreguin saw Adolfinia Hernandez and Steve Vandervort come out of the shipping department and Adolfinia Hernandez was accusing Steve Vandervort of dropping a box of ornaments on her head. Ochoa said: “Yes, This is what these jerks wanted, to do you in.” He got up and followed Adolfinia Hernandez and Steve Vandervort to the office for he was concerned about what happened to Adolfinia Hernandez. Javier Arreguin claims he just stood in the doorway to the office and also claims he returned to work when asked by Lisa Cacace, but he admits returning to the office when Lisa Cacace went to another office. Javier Arreguin claimed he was not in the office, but this assertion is contradicted by Roberto Garcia and others, including Lisa Cacace, whom I find credible for the reasons stated.

According to Javier Arreguin, when he saw Adolfinia Hernandez coming out of the supply room, crying and claiming Steve Vandervort dropped the box on her head on purpose, that he tried to kill her, Arreguin became “angry.” In the office, Adolfinia Hernandez continued claiming Steve Vandervort dropped the box on her head on purpose and Javier Arreguin admitted he remained angry. He admitted Steve Vandervort looked frightened from the time he observed him leading Adolfinia Hernandez from the shipping area. Javier Arreguin admitted he did not recall some of the events and “forget[s] things.” He admitted saying to Steve Vandervort:

A. After, I turned back and I saw that Lisa was not in the office. Steve and Fina were there and I don’t remember if somebody else—but there were no Americans. And then I told Steve—why had he done that? That that wasn’t a good thing to take it off against a woman, that there were men there that could help him if he had any problems against the Union.

Q. Did you say anything else to Steve?

A. No. He just said to me that he didn’t understand. And I said to him, “Yes, you understand.”

In his affidavit, he admitted his statement was a threat. Javier Arreguin claimed his affidavit was incorrect and should have said he did not threaten Steve Vandervort and his statement was “We are a lot of men that can help you.” This statement is highly improbable in the circumstances. Javier Arreguin admitted waiting until Lisa Cacace left the office to make his statement, which is not an act bespeaking his claim of a friendly suggestion. He also claims he returned

to his workplace as soon as he saw Lisa Cacace and others returning, again not an act of reflecting guiltlessness. The affidavit, dated June 23, 1989, was given at a time much closer to the events and when Javier Arreguin’s recall should be fresher and thus probably clearer and more accurate. I therefore credit the version of Javier Arreguin’s actions and statements given in the affidavit as follows:

I was angry because Fina had said that Steve had dropped [sic] the box on her head. I thought he had done it on purpose. I was angry because we like Fina—she’s very nice to us and we were worried because of what had happened. I heard Fina say to Steve, “You did this on purpose.” Steve said, “No, I didn’t.” They said this back and forth—Steve and Fina, and then Lisa said, “Hey, everybody, go back to work.” I left and returned to my work table in the production area. I was still angry, I waited until Lisa left her office and went into the main office. Steve was still in Lisa’s office, along with Fina, and other, Mexican employees. I returned to Lisa’s office, and stood in the doorway. I say to Steve, “Steve, this is not right—doing this to a lady isn’t right. If you have something against us, don’t take it out on a woman—take it with a man—we have a lot of men here who can take care of you if you want it.” He goes, “What, I don’t understand.” I said, “You understand.” I then saw Lisa and others from the front office returning to Lisa’s office, and I returned to my worktable.

What I said to Steve was a threat—he was scared and confused.

Javier Arreguin could read the quoted portions of the affidavit during the hearing and his claim that there were several incorrect statements in his affidavit is not credited based on demeanor as well as the probabilities indicated above. Javier Arreguin did not appear candid and forthright when he disclaimed the accuracy of his affidavit. Further Rafael Lopez corroborated the affidavit version when he testified as follows:

Q. Do you remember exactly what Javier said?

A. That if he—well, that if he had problems with somebody from the Union, that he should settle matters with one of the men of the Union, not the women.

Q. Was the statement made to Steve by Javier that “we had men that can take of this?”

A. Yes, something like that.

Q. How far was Javier from Steve when he said this to him?

A. Some three feet distance.

Lisa Cacace claims she had not left the office until after Javier Arreguin threatened Steve Vandervort, testifying:

And, at this point, Javier was pacing in and out of the office, really nervously. And it was making me really nervous because everybody else was moving around, too, and everybody was really angry and loud. And Javier kept saying, “Why did he have to take it out on Fina. If he doesn’t like the Union, why does he take it out on her? Why does he take it on the ladies? He

shouldn't take it out on the ladies. We have guys here that take care of 'em."

And, at that point, I was terrified. I had to get out of the office. And all I thought of was getting out of there, so I jumped up and ran out of the office. And I went into the back office, where Patti was on the phone.

And I said, "Patti, please don't leave." I said, "I'm scared something's going to happen. I'm afraid for Steve." I was afraid for myself.

Lisa Cacace told Patti Bradley of Javier Arreguin's actions and statements after Adolfinia Hernandez was taken to the hospital. Javier Arreguin's affidavit is further corroboration of Lisa Cacace's testimony. I credit Lisa Cacace's version of Arreguin's actions based on her corroborated testimony and her demeanor, which was free of artifice and indicated candor. Accordingly, I find Arreguin angrily threatened Steve Vandervort, saying: "We have lots of men who can take care of you if you want it." I further find Lisa Cacace told Patti Bradley Javier Arreguin made these comments and indicated she was very intimidated by them and Javier Arreguin's demeanor. She also credibly testified Javier Arreguin was in her office hovering over Steve Vandervort when he made the above-quoted statements. Based on the credited testimony, I further find Javier Arreguin also violated Respondent's rules by going to and remaining at Lisa Cacace's office without authorization, refusing directives to leave the office and return to work, and interfering with Respondent's investigation of the accident and obtaining medical treatment for Hernandez.

c. Rafael Lopez

Rafael Lopez left Respondent's employ voluntarily. While working at Respondent he was active on the union negotiating committee. He also was very active in representing the employees' concerns at the weekly meetings Respondent held every Thursday. Rafael Lopez was suspended for 30 days effective July 5, for the same infractions of employee conduct as Javier Arreguin.

At one point Patti Bradley asked for volunteers to accompany Adolfinia Hernandez to the hospital and Rafael Lopez volunteered. Rafael Lopez admitted he did not leave the office when directed and did not recall Lisa Cacace giving such a directive before Patti Bradley arrived. He also admitted during the incident in the office he believed Steve Vandervort intentionally dropped the box on Adolfinia Hernandez. He testified:

A. There was a moment there when it was Lisa and Fina and myself and Steve. And Steve was questioning Fina and he would say that it had been accident. Steve would say this to Fina, that it had been an accident.

And then I told Steve that it wasn't the moment to put questions to Fina, because she was not well.

Q. And what did Steve say to you?

A. I repeated this three times. And three times he did not listen.

According to Lisa Cacace, whom I have found to be a credible witness and who related her version of the events

to Patti Bradley and the other supervisors who made the decision to suspend Rafael Lopez, as follows:

And Rafael was pacing back and forth, nervously.

And suddenly, he said, "Don't worry, Fina." That, "We have guys here that will take care of this."

And I suddenly realized that the situation was out of hand and I was out of control and that I could not deal with the situation because they weren't listening to me.

So, I looked at Shona, who was still sitting in the same place. And I said, "Shona, go get Patti."

I conclude Rafael Lopez said "we will take care of this" in a manner that was clearly threatening in the described circumstances. I further find that he, like Sara Ochoa, also violated Respondent's rules by going to and remaining at Lisa Cacace's office without authorization, refusing directives to leave the office and return to work, and interfering with Respondent's investigation of the accident and obtaining medical treatment for Hernandez.

d. Roberto Garcia Flores

Roberto Garcia is also an active member of the Union, claiming without refutation that he was the "founder of the Union" at Respondent. He also was a captain on the picket line during a strike at the Company and participated as a member of the Union's negotiating team. He was suspended for 30 days effective June 5, for the same violations of the employee conduct as Javier Arreguin and Rafael Lopez, quoted above.

He admits following Adolfinia Hernandez and Steve Vandervort to the office on June 1. He also admitted he did not recall the events of June 1 very well. Lisa Cacace clearly recalled the following:

And Steve was immediately saying, "Well, it was an accident, Fina, that she thinks"—he was talking to me and he was saying, "she thinks I did it on purpose. And she thinks I'm trying to kill her."

And I was just amazed and I said—at that point, Roberto said that "It wasn't any accident, that he's trying to kill her." And Roberto was standing directly next to Fina, at this point.

A. Roberto said, at one point, while Patti was there, that, "Don't worry, Fina"—you know—"we have guys that'll take care of this. Don't worry."

According to Patti Bradley, Roberto Garcia said to Steve Vandervort "We know how to take—you know—care of men, or people like you." Rafael Lopez admitted Roberto Garcia said to Steve Vandervort "that if he had a problem with a person from the Union, for him not to take revenge or to hurt the women, that there were men, and if he had any problems with somebody from the Union." Roberto Garcia was within 3 feet of Steve Vandervort. Adolfinia Hernandez also recalled Roberto Garcia saying to Steve Vandervort: "Why you do that to her? If you have something against the Union, why do you not wait outside and tell us, men to men, not a man to a woman?"⁸ I find Roberto Garcia refused to

⁸ Adolfinia Hernandez also admitted that Steve Vandervort reacted to this statement by turning to Lisa Cacace and saying: "Lisa, Lisa, you hear that?"

return to work as directed and made threats to Steve Vandervort while they were in Lisa Cacace's office waiting for Adolfinia Hernandez to be taken to the hospital. He exhibited considerable hostility toward Steve Vandervort, admitting he asked Lisa Cacace if Steve Vandervort "has authorization to give Adolfinia Hernandez a hard time."⁹ Moreover, I find he violated Respondent's employee conduct by also going to and remaining at Lisa Cacace's office without authorization, refusing directives to leave the office and return to work, and interfering with Respondent's investigation of the accident and obtaining medical treatment for Hernandez, threatening Vandervort.

e. Other considerations

Lisa Cacace described Steve Vandervort as being as white as a ghost and shaking like a leaf after the threats, so she took him out of the office and sat him down in a back office, then returned to her own office. Steve Vandervort, who was discharged from Respondent for failing to meet the requirements of his probation, testified convincingly that while he was in Lisa Cacace's office, the alleged discriminatees surrounded him and spoke to him in loud voices. They spoke to one another in Spanish and Steve Vandervort did not understand Spanish, however certain statements were made to him in English, including accusations that he tried to kill Adolfinia Hernandez. He also testified Roberto Garcia, who was within a foot of him and appeared angry, his teeth were showing, said: "You shouldn't pick on the ladies. If you don't like the Union, you should come to us. Why are you picking on the ladies?"

Another employee, whom he could not identify, came up to him and said: "We have guys here that are going to take care of you. You shouldn't have done this to a lady." It was at this point that Lisa Cacace took him out of the office. Steve Vandervort is 5'3" tall and weighs 115 pounds. According to Newman Strawbridge: Rafael Lopez is about 5'1" and weighs about 140–150 pounds; Javier Arreguin is between 5'1" and 5'3" and weighs about 150 pounds; and, Roberto Garcia is between 5'1" and 5'2" and weighs about 140 or 150 pounds. I find the alleged discriminatees intimidated Vandervort with their actions and threats.

After Adolfinia Hernandez was sent to the hospital, Patti Bradley went out on the factory floor and informed the employees she was on her way and Steve Vandervort was being sent home for the rest of the day. Steve Vandervort was sent home at about 2:15 p.m. Lisa Cacace and Patti Bradley made some notes after the incident. Patti Bradley and Lisa Cacace were upset about the incident, both the assertions of dangerous working conditions and what they considered threats made to Steve Vandervort. They decided to hold a meeting with Javier Arreguin, Sara Ochoa, Rafael Lopez, and Roberto Garcia.

⁹You hear that? He tried to—[in Spanish]—well, he intimated that he was being threatened."

⁹I also find Roberto Garcia was not candid in his testimony. He claimed Steve Vandervort was laughing and appeared calm, while all the other witnesses admitted Steve Vandervort appeared pale and at least very concerned if not upset and scared.

4. The 4 p.m. meeting on June 1

After discussing the incident in the office and making their notes of what they recalled hearing in the office, Patti Bradley and Lisa Cacace decided to call Javier Arreguin, Sara Ochoa, Rafael Lopez, and Roberto Garcia into the office to investigate their actions earlier that day. At or about 4 p.m. they called the four employees into Patti Bradley's office and the meeting began with Lisa Cacace reading some of the statements they had written down. Debbie Shaw acted as interpreter. For example, Lisa Cacace asked what was meant by "we can take care of people like you."

According to Patti Bradley, whom I have previously found to be a credible witness, Roberto Garcia denied his statements meant he would harm Steve Vandervort but he accused Steve Vandervort of intentionally harming Adolfinia Hernandez. Patti Bradley also credibly recalled,

And Sara said, "Yes, at first we did say that he was trying to kill her, but we just—but we were just too excited. We all talked about it and we were just too excited."

Javier said that—that he didn't mean to kill her Steve Vandervort—that he didn't mean to say that he would kill her, he didn't want to go to jail, no way.

The alleged discriminatees all testified that during the 4 p.m. meeting, they denied threatening Steve Vandervort earlier in the day but admitted they were questioned if they had threatened Steve Vandervort earlier in the day. Javier Arreguin admitted the employees were asked if they had threatened Steve Vandervort and that they were told Respondent had to send him home because one of them said "they were going to kill him."

The meeting was then opened to discussions relating to the employees' concerns, including safety; how the shipping department was dangerous for Adolfinia Hernandez who had suffered several accidents since her return to work only 2 weeks before the latest accident. The employees also mentioned Steve Vandervort disliked the Union and was taking it out on Adolfinia Hernandez; he did not want Adolfinia Hernandez to return to work and ordered her not to discuss her problems with higher management, but to come to him. Rafael Lopez then discussed how working conditions and relationships had deteriorated since the strike. For example, the bathrooms were locked. Rafael Lopez complained the owners of the Company were less available to the employees; and, they hired supervisors that did not have the requisite experience and knowledge of the products to perform well. They also discussed wages.

C. Events of June 2

Respondent requested Steve Vandervort to make notes of the incident and on June 2, Patti Bradley and Lisa Cacace went to the homes of Steve Vandervort and Adolfinia Hernandez to interview them about the accident and events occurring in Lisa Cacace's office. Respondent had asked Steve Vandervort to stay home the day after the accident until it could be determined how volatile the situation was and if it was appropriate for him to return to work. Steve Vandervort had written down his recollection of the events so they took that memorandum and went to Adolfinia Hernandez' home.

At Adolfinia Hernandez' home they were met by Newman Strawbridge and Ed Kehoe¹⁰ of the Union who were asked by Adolfinia Hernandez to be present when Respondent interviewed her and to act as a translator. Respondent indicated they felt the presence of union agents was a barrier to the interview, and they left without getting a statement from Adolfinia Hernandez.

D. The Events of June 5 and 6

On the following Monday morning, June 5, one of the owners of Respondent, Stephanie Eddy, called a management meeting which was attended by Patti Bradley, Lisa Cacace, David Salm, and Lee Ferro. Patti Bradley wanted to discharge those employees she felt threatened Steve Vandervort because: "I felt that their behavior was so inciteful [phonetic] and caused so much disruption that I felt that they should be all terminated." Stephanie Eddy and her husband Dorr Eddy decided to hold a management meeting to determine what, if any, discipline should be imposed. At the meeting it was decided that Javier Arreguin, Rafael Lopez, and Roberto Garcia would be suspended for 30 days and Sara Ochoa for 2 weeks because they could not determine if she made any threats since she spoke only in Spanish and could only be held responsible for leaving her work station without authorization, failing to obey the directives to return to work, and interfering with Respondent's investigation of the accident and efforts to provide Hernandez medical aid.

On Monday afternoon, Respondent informed Sara Ochoa and Roberto Garcia of their suspensions, apprising them of the specific infractions leading to their discipline. The following morning, Javier Arreguin and Rafael Lopez were individually asked to come to the Lisa Cacace's office. Rafael Lopez came first and was informed of his suspension and after he left Javier Arreguin was called to the office and similarly informed of the reasons for the discipline and his 30-day suspension.

Patti Bradley informed them they were being disciplined because they broke the rules, highlighted the rules they broke, and explained each infraction. She indicated the nature of the explanation when she was testifying about what she told Javier Arreguin was suspended for: "using unsafe practices by me not being able to get medical attention to Fina, that you were upsetting and threatening Steve."

Analysis and Conclusions

I conclude General Counsel had not made a prima facie case Javier Arreguin, Rafael Lopez, Sara Ochoa, and Roberto Garcia were suspended for engaging in union and/or other concerted protected activities. I further find, assuming arguendo, General Counsel had made a prima facie case of illegal discipline, Respondent has demonstrated by a preponderance of the credible evidence, that the four employees would have been disciplined absent their protected activity. *Wright Line*, 251 NLRB 1083 (1980).

General Counsel argues Sara Ochoa acted reasonably when she stopped work to go with other employees to Lisa Cacace's office because of her concern for Adolfinia Hernandez' safety because she said she could not concentrate on her

work until sure Adolfinia Hernandez was all right and because Adolfinia Hernandez requested her coworkers stay. General Counsel contends all the alleged discriminatees were engaging in concerted protected activity for they were concerned about Adolfinia Hernandez "receiving proper and immediate medical attention." I find this argument to be without merit. On the contrary, they increased Hernandez' hysteria, interfered with Respondent's investigation of the accident, and delayed the acquisition of medical attention.

Respondent was conducting an investigation into what occurred to Adolfinia Hernandez and attempting to determine if she desired or needed medical attention. The evidence clearly demonstrates the presence of Javier Arreguin, Rafael Lopez, Sara Ochoa, and Roberto Garcia exacerbated Adolfinia Hernandez' hysteria which gave Respondent grave cause for concern about Hernandez' health because of her history of heart disease. Respondent's attempts to calm Adolfinia Hernandez were repeatedly defeated by the alleged discriminatees' excited, boisterous, and threatening presence.

The employees were not engaged in concerted protected activities when they spontaneously and without authorization left their work stations to follow Adolfinia Hernandez to the office. As Ochoa admitted, they wanted to "see what happened with Fina." They were not presenting grievances or engaging in other concerted protected activity such as contract discussions or protesting an unfair labor practice committee by Respondent. They did not request any action and were not part of any attempt to induce group action; they were not designated spokesmen nor representatives of other employees when they went to Lisa Cacace's office and therefore their actions were not protected concerted activity under the *Thor Power* doctrine, 148 NLRB 1379 (1964). See *K & M Electronics*, 283 NLRB 279 (1987), and *Antenna Department West*, 266 NLRB 909 (1983).

Assuming they were acting in concert, they lost any protection afforded under the Act when they engaged in insubordination by refusing to follow three or more directives to return to work so Respondent could discern what occurred to Adolfinia Hernandez and obtain medical assistance. They remained in and around the office, were loud, angry, and threatened a supervisor with harm. There is no evidence any supervisor has previously condoned such conduct. Respondent's rules of conduct were well established and included provisions for disciplinary action in the event an employee violated these rules. *Mead Corp.*, 275 NLRB 323 (1985); *Carolina Freight Carriers Corp.*, 295 NLRB 1080 (1989). Respondent has convincingly demonstrated Ochoa, Arreguin, Garcia, and Lopez violated the Company's rules by going to and remaining at Lisa Cacace's office without authorization, refusing directives to leave the office and return to work, and interfering with Respondent's investigation of the accident and obtaining medical treatment for Hernandez. Further, Respondent has established by a preponderance of the credible evidence Arreguin, Lopez, and Garcia threatened Supervisor Steve Vandervort who was intimidated by these threats which were made with visible anger.

I find General Counsel has failed to prove animus. Respondent conducted an investigation into the conduct of the alleged discriminatees and I conclude Respondent held a good-faith belief they were repeatedly insubordinate and Javier Arreguin, Rafael Lopez, and Roberto Garcia threatened Steve Vandervort with physical violence. *Salvation*

¹⁰ Strawbridge identified Kehoe as a professor at the union school whom he felt was a more capable interpreter than he, so he asked him to accompany him to Hernandez' house on June 2.

Army Williams Memorial Residence, 293 NLRB 994 (1989). There is no evidence Respondent condoned threats or insubordination in the form of repeated refusals to return to work or other breaches in the rules of employee conduct. *Massillon Community Hospital*, 282 NLRB 675 (1987); *Evans St. Clair, Inc.*, 278 NLRB 459 (1986). Cf. *Betcher Mfg. Corp.*, 76 NLRB 526, 527 (1948). Cf. *Ben Pekin Corp.*, 181 NLRB 1025 (1970), enfd. 452 F.2d 205 (5th Cir. 1971); wherein the court held: Not every impropriety committed during Section 7 activity places the employee beyond the protective shield of the Act” and “the employees’ right to engage in concerted activity may permit some leeway for impulsive behavior.”

The leeway was exceeded by the employees for they blatantly refused several directives to return to work in the presence of other employees, seriously undermining the authority to Patti Bradley and Lisa Cacace. Javier Arreguin, Rafael Lopez, and Roberto Garcia also menacingly threatened another supervisor, Steve Vandervort, further exacerbating the effects of the accident and impeding Respondent’s ability to promptly and effectively deal with the accident and its effects.

I find General Counsel’s reliance on *Consumers Power Co.*, 282 NLRB 130 (1986), inappropriate in this case for the alleged discriminatees were not engaged in bringing complaints or suggestions to Respondent’s attention; they were preventing Respondent from handling an accident in a calm and appropriate manner. The evidence does not support a conclusion the alleged discriminatees’ actions were merely a continuation of their earlier meetings during break at 9:30 a.m. and with Respondent at 9:45. In fact, it is undisputed the employees agreed to defer discussing their safety concerns until the meeting the following Thursday. Only after the events on June 1, which led to their suspensions, did the

discriminatees discuss wages and other terms and conditions of employment with Respondent during the 4 p.m. meeting.

In sum, I find Respondent disciplined Javier Arreguin, Rafael Lopez, Roberto Garcia, and Sara Ochoa for unprotected insubordination and Javier Arreguin, Rafael Lopez, and Roberto Garcia for threatening Steve Vandervort; the disciplinary actions were not discriminatorily motivated. The alleged discriminatees each engaged in specific acts of disobedience which were not excused by any claim they were engaging in some generalized unsupported act of concerted activity. The record is devoid of any evidence Respondent acted with hostility to the employees’ union or other concerted protected activity or other indicia of union animus. Accordingly, I recommend the complaint be dismissed in its entirety.

CONCLUSIONS OF LAW

1. Calliope Designs, Inc., is an employer engaged in commerce within the meaning of the Act.

2. Sonoma County Industrial Union/S.E.I.U., Local 707 is a labor organization within the meaning of the Act.

3. The General Counsel has not established by a preponderance of the evidence that Respondent has violated the Act as alleged in the complaint.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹¹

ORDER

The complaint is dismissed in its entirety.

¹¹ If no exceptions are filed as provided by Sec. 102.46 of the Board’s Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.